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Supreme Court, U.S.
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No. 00-691

IN THE

Supreme Court of the United States

WFAA-TV, INC. and ROBERT RIGGS,

Petitioners,

v.

CARVER DAN PEAVY and SALLY PEAVY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

MICHAEL J. QUILLING
Counsel of Record
KENNETH A. HILL
QUILLING, SELANDER, CUMMISKEY
& LOWNDS, P.C.
Attorneys for Respondents
2001 Bryan Street, Suite 1800
Dallas, Texas 75201
(214) 871-2100

164135

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the First Amendment shields the press from a civil claim for violating the use and disclosure provisions of the federal and state wiretap laws with full knowledge of, encouragement of, and participation in the illegal interceptions.

2. Whether ignorance of the law excuses a civil violation of the use and disclosure provisions of the federal wiretap act.

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STATEMENT OF THE CASE

Dan and Sally Peavy filed this lawsuit to recover civil damages against a local television station, WFAA-TV, Inc. ("WFAA"), and one of its investigative reporters, Robert Riggs, for violations of the federal and state wiretap laws. WFAA and Riggs participated with the Peavys' neighbors to intercept and record the Peavys' private telephone conversations, which they then used and disclosed in the course of investigating a news story. The investigation culminated in a series of highly critical exposés on the local television news.

A. Statement of Relevant Facts.

In early December 1994, Charles and Wilma Harman began using a police scanner to purposefully intercept the cordless telephone calls of their neighbors, Dan and Sally Peavy. Pet. App. 2a. At that time, Dan Peavy was a trustee for the Dallas Independent School District ("DISD"). *Id.* The Harmans claimed that local law enforcement officials told them it was legal for them to intercept and record the Peavys' calls. *Id.* However, in a related case, the trial court found that no one told them their conduct was legal. *Id.* at 2a-3a; *Goodspeed v. Harman*, 39 F. Supp. 2d 787, 793-94 (N.D. Tex. 1999).

On December 8, 1994, Charles Harman called WFAA and told a producer that he had evidence of wrongdoing by Dan Peavy. Pet. App. 3a. Riggs called Harman back later that day, and Harman explained that he suspected Dan Peavy of public corruption. *Id.* At that time, Riggs had never heard of Dan Peavy and was not working on any story involving DISD insurance. *Id.*

The next day, Riggs went to the Harmans' home and saw exactly how the Harmans were intercepting the Peavys' calls.

Pet. App. 3a. The Harmans told Riggs they were intercepting the Peavys' cordless telephone calls with a scanner and discussed some of the conversations they had intercepted. *Id.* Riggs saw the scanner and listened to a tape of some of the intercepted calls. *Id.* Riggs knew the parties to the calls were not aware of, and did not consent to, the interception or recording. *Id.*

There was conflicting evidence about whether Harman told Riggs the interceptions were legal or Riggs told Harman they were legal. Pet. App. 3a. In any event, *no* law enforcement officials ever told Riggs, WFAA, or Harman it was legal. *Id.* at 2a-3a.

At the conclusion of the meeting on December 9, 1994, Riggs said he wanted any more tapes the Harmans made of the Peavys' calls in the future and instructed the Harmans how they should record the calls. Pet. App. 3a-4a, 16a, 17a. Specifically, Riggs told the Harmans not to turn the recorder off during the calls and not to edit the tapes. *Id.* at 3a-4a, 16a, 17a. The Harmans followed Riggs' instructions. *Id.* at 17a.

Riggs took the Harmans' tape of the Peavys' calls and returned to WFAA's offices to meet with the news director and other WFAA personnel. Pet. App. 4a. Riggs told them about his meeting with the Harmans and played parts of the tape for them. *Id.* Based on what they heard on the tape, they decided to launch an investigation of Dan Peavy and his activities involving insurance programs at DISD. *Id.* at 4a-5a. Riggs directed WFAA personnel to start researching the things they heard on the tape about Dan Peavy and the DISD. *Id.* at 4a.

The Harmans continued to intercept and record (consistent with Riggs' instructions) the Peavys' calls. Pet. App. 16a. Sometimes the Harmans would call Riggs to tell him they had another tape, and sometimes Riggs would call the Harmans to

ask if they had more tapes. *Id.* Riggs wanted more information from the Harmans to further his investigation of Peavy, and he asked them to keep him informed about anything else they heard on the Peavys' calls. *Id.* Whenever the Harmans had another tape, Riggs or his producer would go and pick it up. *Id.* Riggs had "a lot" of telephone conversations with the Harmans. *Id.*

Harman hated Peavy and wanted to "take him down." *Goodspeed*, 39 F. Supp. 2d at 792-93. Riggs encouraged the Harmans to keep intercepting the calls by assuring them he would look into the things on the tapes and telling them he was finding more "stuff" against the Peavys based on the tapes. Pet. App. 16a. Harman was "delighted" at the prospect of Riggs publicly humiliating Peavy. *Goodspeed*, 39 F. Supp. 2d at 792.

Over a period of approximately three months, WFAA and Riggs took eighteen tapes from the Harmans containing 188 conversations between the Peavys and others. Pet. App. 5a. WFAA and Riggs used and disclosed the contents of the tapes extensively in their investigation of Peavy and insurance issues at DISD. Pet. App. 4a-5a. WFAA personnel listened to every one of the tapes and had key conversations transcribed. *Id.* at 4a. They formulated story outlines, prepared memoranda, and conducted interviews and research, all based upon the contents of the tapes. *Id.* at 4a-5a.

In February 1995, law enforcement officials told Riggs it was illegal to intercept cordless telephone calls. Pet. App. 5a. Riggs checked with WFAA's outside attorney, Paul Watler, who confirmed that the interceptions were illegal. *Id.* However, Watler said WFAA and Riggs could use and disclose the contents of the tapes because the First Amendment would shield them from liability. *Id.* at 5a-6a.

Even after learning the interceptions were illegal, Riggs continued to talk to the Harmans to find out what they were hearing as they continued to intercept the Peavys' calls. Pet. App. 6a. WFAA and Riggs continued their investigation, notwithstanding the illegality of the tapes on which the whole thing was based. *Id.* They also kept at least one copy of the transcript they had made of key parts of the Peavys' conversations.[1] *Id.* Even after being told the tapes were illegal, Riggs nonetheless told federal law enforcement officials and a Dallas Police detective about the contents of the tapes and reported back to Harman on those discussions. *Id.* at 7a.

Beginning on July 31, 1995, WFAA broadcast several "exclusive" exposé news reports in which investigative reporter Riggs alleged serious wrongdoing by Dan Peavy in connection with DISD insurance programs. Pet. App. 6a-7a, 23a. Several months later, Dan Peavy was indicted on over forty counts of federal offenses related to his involvement with DISD insurance. *Id.* at 68a. He was later acquitted of all charges after a federal jury trial. *Id.*

B. The Petitioners' Factual Statements are Full of Irrelevant, Scandalous, and Erroneous Contentions.

The Petitioners spend most of their background statement (Pet. 3-7) trying to paint Dan Peavy as the villain. They spend page after page trying to poison the Court against the Peavys, accusing Dan of everything from corruption to racism to being

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1. The Petitioners' state "As soon as WFAA and Riggs learned that the interceptions were unlawful, they . . . transferred all copies of the tapes and related documents to their attorney for safekeeping." Pet. 15. That statement is wrong, as set forth in the Fifth Circuit opinion. Pet. App. 6a.

a bad neighbor.[2] Yet a few pages later, they say the specific details of the underlying facts are not relevant to the legal issues presented. Pet. 13.

It is important to remember that the District Court decided the case on summary judgment evidence only. Pet. App. 74a. Many of the District Court's findings were not supported by the evidence and/or were controverted by other evidence. The Peavys did not challenge all of the District Court's erroneous findings, because those findings were not relevant to the issues presented on appeal. Nor are they relevant to the issues presented in this case.

The thrust of the Petitioners' background statement is that Dan Peavy is such a bad person that his rights (and apparently those of his wife, Sally) are not worthy of protection. Even if what the Petitioners said were completely true, it would not somehow excuse their illegal activity. The wiretap laws protect everyone, even prisoners, against violations by anyone, even law enforcement officials. *Campiti v. Walonis*, 453 F. Supp. 819, 823 (D. Mass 1978), *aff'd*, 611 F.2d 387 (1st Cir. 1979).

Dan Peavy was investigated extensively by the FBI, the DISD's independent investigators, and the Petitioners themselves. Pet. App. 68a. He was indicted on over 40 counts, he was tried in a lengthy federal jury trial, and he was acquitted of all charges. *Id.*

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2. The Petitioners go so far as to quote part of an anonymously recorded telephone conversation that has absolutely nothing to do with the Petitioners or this case. Pet. 7. The District Court (which ruled against the Peavys) mentioned the tape but stated "A detailed recitation of these highly offensive remarks is neither necessary nor appropriate." Pet. App. 69a, n.5. The Fifth Circuit never even mentioned it. *See, generally*, Pet. App. 1a-60a. The Peavys object to inclusion of that conversation in the Petition on the ground that it violates S. Ct. Rule 26.4.

Throughout the Petition, the Petitioners complain that they should not be held liable because law enforcement officials and their attorney told them their conduct was legal. Pet. 16 ("advice they received from the government"), 17 ("advised of the lawfulness by local police, the district attorney, and [their] own attorney"), 18 ("authoritative legal advice"), 19 ("advice of law enforcement officials and legal counsel"). However, the *only* advice WFAA and Riggs ever received from law enforcement officials was that the interceptions were *illegal*. Pet. App. 5a. Although Harman claimed law enforcement officials and the district attorney's office told him the interceptions were legal, the trial court rejected that contention and found that *no one* ever told him it was legal. Pet. App. 2a-3a. WFAA's outside counsel *confirmed* that the interceptions were *illegal*, but he opined that the First Amendment would somehow shield WFAA and Riggs from liability. Pet. App. 5a-6a.

The Petitioners also refer to "authoritative legal advice" and "other information" that the interceptions were not unlawful. Pet. 18, 19. However, the *only* people who ever told WFAA and Riggs the interceptions were legal were Harman (who can hardly be considered authoritative) and and Watler (who acknowledged his error a short time later and confirmed that the interceptions violated the wiretap laws). Pet. App. 2a, 4a, 5a. The Petitioners fail to explain what "other information" made them think the interceptions were lawful.

REASONS FOR DENYING THE WRIT

A. The Petitioners' First Amendment Issue Does Not Merit Review by This Court.

The Petitioners make only one argument for granting their Petition on their First Amendment issue — they say this case presents the same constitutional question as *Bartnicki v. Vopper*,

Nos. 99-1687 and 99-1728, and ask the Court to hold the Petition in abeyance pending the decision in that case. Pet. 11, 12, 13, 15. The Petition should be denied on this issue for several reasons. First, this case is factually and legally distinguishable from *Bartnicki* in a constitutionally significant respect. Second, the Fifth Circuit's ruling on this issue does not conflict with any other federal court of appeals on any important matter. Third, the Fifth Circuit's opinion on this issue follows the settled precedents of this Court. Fourth, the Petitioners violated S. Ct. Rule 29.4(c) with respect to their constitutional challenge to the Texas statute.

1. This Case is Different from *Bartnicki* in a Constitutionally Significant Respect, and this Court's Ruling in *Bartnicki* Cannot Possibly Help the Petitioners.

The Petitioners overlook a critical distinction between this case and *Bartnicki* — their own knowledge of, encouragement of, and participation in the illegal interceptions. From the very first sentence and throughout the *Bartnicki* opinion, the Third Circuit emphasized the significance of the fact that the defendants had nothing to do with the interception. *Bartnicki v. Vopper*, 200 F.3d 109, 112, 113-114, 115, 119, 125, 128, 129 (3d Cir. 1999), *cert. granted*, 68 U.S.L.W. 3685 (U.S. June 25, 2000) (Nos. 99-1687, 99-1728). The court was very careful to point out the limited scope of the question it considered and the holding it reached:

> All that is at issue is the application of those [wiretap] statutes to punish members of the media *who neither encouraged nor participated directly or indirectly in the interception.*

* * *

> We therefore hold that the Wiretapping Acts fail the test of intermediate scrutiny and may not constitutionally be applied to penalize the use or disclosure of illegally intercepted information *where there is no allegation that the defendants participated in or encouraged that interception.*

Id. at 128, 129 (emphasis added).

Likewise, *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3686 (U.S. Apr. 25, 2000) (No. 99-1709), is a case in which the defendant had nothing to do with the illegal interception.[3] *Id.* at 465. Like *Bartnicki*, the *Boehner* court carefully limited the scope of its ruling to that specific context. *See id.* at 478 (Randolph, J.) (disclosure provisions of federal and state wiretap acts are "not unconstitutional as applied in this case"); *id.* at 478-79 (Ginsburg, J., concurring) (same).

In the case at bar, the Fifth Circuit recognized and respected that *Bartnicki* was limited to the situation where a defendant has nothing to do with the interception. Pet. App. 48a. The court repeatedly emphasized WFAA and Riggs' involvement in the interceptions[4] and distinguished *Bartnicki* on that basis alone,

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3. The Petitioners misstate the ruling in *Boehner* when they say it "raises questions of the role of the defendant in the interception of the telephone conversation at issue." Pet. 14. There was no allegation or finding in *Boehner* that the defendant had anything whatsoever to do with the illegal interception. *See, generally, Boehner*, 191 F.3d 463. The only question in *Boehner* about the conduct of the defendant was his participation in the illegal *disclosure* of the conversation when he accepted the tape from the individuals who intercepted it. *Id.* at 475-76, 479, 480.

4. Pet. App. 1a, 16a-17a, 32a, 33a, 34a, 35a, 49a, 50a, 53a, 57a.

explaining that the controlling facts of *Bartnicki* were "obviously, quite different from those here." *Id.* at 48a.

WFAA and Riggs' involvement with the interceptions is constitutionally significant for two reasons. First, it avoids any concern that the statutes might not be "narrowly tailored" to advance the government's interest in protecting the privacy of communications. The *only* speech or expression at issue is WFAA and Riggs' intentional use and disclosure of information they helped obtain through secret interceptions of many hundreds[5] of Dan and Sally Peavy's personal telephone calls. Second, it avoids any concern that applying the statutes to WFAA and Riggs in this case might somehow chill expression or lead to self-censorship. WFAA and Riggs knew *exactly* how the Harmans were intercepting and recording the Peavys' calls. Riggs saw the scanner, told the Harmans how to record, and encouraged them to keep doing it. Holding WFAA and Riggs liable in this case will not put any burden on the press to determine how their sources got their information or restrain publication of information from unknown or uncertain sources.

WFAA and Riggs cannot possibly be entitled to any greater First Amendment protection than the defendants in *Bartnicki*, who had no involvement whatsoever with the interception. However, WFAA and Riggs' involvement with the interceptions certainly could (and the Peavys respectfully submit *should*) give them less First Amendment protection than the *Bartnicki* defendants. If this Court reverses *Bartnicki* (holding the wiretap laws constitutional as applied), WFAA and Riggs cannot possibly expect to prevail on their First Amendment defense.

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5. WFAA and Riggs had 18 tapes of the Peavys' calls, which contained 188 separate conversations. However, only about ten percent of all intercepted conversations were taped. *Goodspeed*, 39 F. Supp. 2d at 789.

On the other hand, if the Court affirms *Bartnicki* (holding the wiretap laws *un*constitutional as applied), the involvement of WFAA and Riggs in the interceptions will keep them outside the protection of that case. Consequently, *Bartnicki* cannot possibly help WFAA and Riggs.

2. The Fifth Circuit's Ruling Does Not Conflict With Any Other Federal Court of Appeals on Any Important Matter.

All three federal courts of appeal that have considered a First Amendment challenge to the wiretap laws have adopted and applied the exact same standard — intermediate scrutiny. *Boehner*, 191 F.3d at 467; *Bartnicki*, 200 F.3d at 123; *Peavy*, Pet. App. 53a. The different results were dictated by applying that standard to the distinct facts of each case. In each case, the court emphasized that its holding was limited to the specific factual circumstances involved. *Boehner*, 191 F.3d at 478 (Randolph, J.), 478-79 (Ginsburg, J., concurring); *Bartnicki*, 200 F.3d at 117, 129; *Peavy*, Pet. App. 34a, 57a. If any of these three decisions is incorrect, it is due only to a misapplication of the intermediate scrutiny standard. A petition for writ of certiorari is "rarely granted" for that kind of error. S. Ct. Rule 10.

3. The Fifth Circuit's Ruling Follows the Settled Precedents of this Court.

The Fifth Circuit, like both of the other federal courts of appeal that have addressed the issue, followed the settled precedents of this Court to hold that the wiretap laws are subject to intermediate First Amendment scrutiny. Pet. App. 53a; *Boehner*, 191 F.3d at 467; *Bartnicki*, 200 F.3d at 123. Then the Fifth Circuit followed the settled precedents of this Court to

hold that the wiretap laws satisfy that standard as applied to the particular facts of this case. Pet. App. 57a-58a. Those rulings do not merit review by this Court.

a. The Wiretap Laws are Subject to Intermediate Scrutiny.

This Court has established two levels of First Amendment scrutiny for laws that have some impact on speech. Strict scrutiny applies to laws that (a) target or single out the press, *e.g.*, *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103-04 (1979), or (b) regulate speech based on content, *e.g.*, *Boos v. Barry*, 485 U.S. 312, 321 (1988). Otherwise, intermediate scrutiny applies. *E.g.*, *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). The wiretap laws at issue in this case do not fall within either category of laws that would trigger strict scrutiny.

The federal and Texas wiretap laws do not target or single out the press. They apply equally to all "persons." 18 U.S.C. § 2511(1); Tex. Civ. Prac. & Rem. Code § 123.002(a). They also prohibit all uses and disclosures, not just media publication. *Id.*; *cf. Daily Mail*, 443 U.S. at 98 (applied strict scrutiny to statute that prohibited certain information from being "published in any newspaper without a written order of the court"); *Florida Star v. B.J.F.*, 491 U.S. 524, 526 (1989) (applied strict scrutiny to statute that prohibited certain information from being disseminated "in any instrument of mass communication").

The federal and Texas wiretap laws do not regulate speech on the basis of content. Five federal courts of appeal have held that the federal wiretap act is content-neutral. *Peavy*, Pet. App. 53a; *Bartnicki*, 200 F.3d at 123; *Boehner*, 191 F.3d at 467-68; *see also*, *United States v. Underhill*, 813 F.2d 105, 110 (6th Cir.), *cert. denied*, 482 U.S. 906 (1987) (illegality is

not determined by the subject of the intercepted communication); *Watkins v. L.M. Berry & Co.*, 704 F.2d 577, 584 (11th Cir. 1983) (same). Although the Texas wiretap act uses different language that the federal act, the Texas act is likewise content-neutral. Tex. Civ. Prac. & Rem. Code § 123.002(a)(2).

Government regulation of expression is "content neutral" if it is justified without reference to the content of the regulated speech. *E.g.*, *Hill v. Colorado*, __ U.S. __, 120 S. Ct. 2480, 2491 (2000). The use and disclosure provisions of the wiretap laws are triggered not by the content of the communication, but rather by the conduct by which the information was obtained (*i.e.*, unlawful interceptions).[6] 18 U.S.C. § 2511(1); Tex. Civ. Prac. & Rem. Code § 123.002(a). The Petitioners would have been free to use and disclose the same content if they had gotten it without the aid of the illegally intercepted tapes. *Certain Interested Individuals v. Pulitzer Pub. Co.*, 895 F.2d 460, 467 (8th Cir.), *cert. denied*, 498 U.S. 880 (1990). The only significance of the content of the intercepted communication is to prove the existence of a violation and the amount of damages.[7]

6. The Fifth Circuit's ruling is perfectly consistent with this Court's precedents upholding content-neutral restrictions that are triggered solely by the source of the information sought to be disclosed or the method by which the information was acquired. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33-34 (1984) (information produced to a newspaper in civil discovery); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670-71 (1991) (reporter obtained information by agreeing not to publish the source's name). Strict scrutiny is *not* appropriate for these kinds of restrictions. *Cohen*, 501 U.S. at 670-71; *Seattle Times*, 467 U.S. at 33-34; *cf.*, *e.g.*, *Florida Star*, 491 U.S. at 526 (applied strict scrutiny to statute that prohibited publishing the name of a victim, regardless of how the press obtained the name).

7. This Court has never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct. *Hill*, 120 S. Ct. at 2492.

The Petitioners are not entitled to any greater First Amendment protection just because they are members of the media. The media does not have any greater First Amendment protection of its speech than other persons. *Cohen*, 501 U.S. at 670; *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972); *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 150 (1967). Nor does the media enjoy any special right of access to information over other persons. *Branzburg*, 408 U.S. at 684; *Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 609 (1978); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 849-50 (1974). In the words of this Court:

> It would be frivolous to assert . . . that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news.

Branzburg, 408 U.S. at 691.

b. The Wiretap Laws Satisfy the Intermediate Scrutiny Standard on the Facts of this Case.

Under this Court's intermediate scrutiny standard, a regulation will be sustained if it furthers an important or substantial governmental interest, the governmental interest is unrelated to the suppression of free expression, and the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that governmental interest. *Turner*, 512 U.S. at 662; *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

The Constitution guarantees citizens a right of privacy in their communications. The First Amendment right of free speech includes a concomitant right of privacy *not* to speak publicly. *Harper & Row, Pub., Inc. v. Nation Enters.*, 471 U.S. 539, 559-60 (1985). The First Amendment freedom *not* to speak publicly serves the same ultimate end as the First Amendment freedom to affirmatively speak. *Id.* Likewise, the Fourth Amendment protects the right of "conversational privacy." *Pulitzer*, 895 F.2d at 464.

The government obviously has a substantial interest in protecting the constitutional right of privacy in communications. That interest is unrelated to the suppression of free expression; instead, it promotes free expression by assuring citizens that their private communications will remain private:

> [P]rotection of the privacy of communications is vital to our society. We depend upon the free interchange of ideas and information. And we are dedicated to the proposition that each individual should be free from unwarranted intrusion into his private affairs. Both these interests are threatened by modern techniques of electronic surveillance, however, since it is now possible to record surreptitiously the most intimate conversations and to preserve them for later disclosure.

United States v. Cianfrani, 573 F.2d 835, 856 (3d Cir. 1978).

The wiretap laws promote the government's interest in protecting the privacy of communications. In 1968, Congress found that "[t]he tremendous scientific and technological developments that have taken place in the last century have made possible today the widespread use and abuse of electronic surveillance techniques. As a result of these developments,

privacy of communication is seriously jeopardized . . . ." S. Rep. No. 90-1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 2112, 2154. More specifically, Congress found as follows:

> Commercial and employer-labor espionage is becoming widespread. It is becoming increasingly difficult to conduct business meetings in private. Trade secrets are betrayed. Labor and management plans are revealed. No longer is it possible, in short, for each man to retreat into his home and be left alone.[8] Every spoken word relating to each man's personal, martial, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage.

Id. (footnote added).

In 1986, Congress found that the development of cellular telephones, computers, and other new means of electronic communication had made the problem even worse. "[T]remendous advances in telecommunications and computer technologies have carried with them comparable technological advances in surveillance devices and techniques," increasing the risk that communications "may be open to possible wrongful use and public disclosure by . . . unauthorized private parties." S. Rep. No. 99-541, 99th Cong., 2d Sess., *reprinted in* 1986 U.S.C.C.A.N. 3555, 3557.

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8. The "right to be let alone" has been characterized as "the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

Congress responded to these privacy concerns by enacting the federal wiretap act, 18 U.S.C. § 2510, *et seq.*, which represents a "comprehensive scheme for the regulation of wiretapping and electronic surveillance." *Gelbard v. United States*, 408 U.S. 41, 46 (1972). In enacting those laws, Congress "intended to protect the privacy of the communication itself" and intended for the protection to be "comprehensive." 1968 U.S.C.C.A.N. at 2178.

In addition to the federal wiretap act, 45 states and the District of Columbia have enacted statutes that prohibit interception *and disclosure* of electronic communications. *See Boehner*, 191 F.3d at 468, n.6 (listing state statutes). That bolsters the congressional and judicial findings that the use and disclosure provisions of the wiretap laws effectively promote the government's interest in protecting the privacy of communications. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 834-35 (1978) (the fact that 47 states and the District of Columbia require judicial review commission proceedings to be kept confidential indciates that confidentiality promotes the government's interest in insuring the ultimate effectiveness of judicial review commissions).[9]

The use and disclosure provisions of the wiretap laws are essential to protect the privacy of communications: "Only by governing strictly both authorization [of interception] and disclosure of intercepted communications did Congress believe that such weighty interests could be protected adequately." *Cianfrani*, 573 F.2d at 855. From the outset, Congress recognized that prohibition of interception alone would not be enough to protect the privacy of communications. The identities

9. The Petitioner in *Landmark* did not challenge the statutory requirement of confidentiality. 435 U.S. at 836. Only two other states had provisions similar to the one this Court struck down on constitutional grounds in *Landmark*. *Id.*

of those involved in unlawful interception "[a]ll too often . . . will go unknown." 1968 U.S.C.C.A.N. at 2156. "Only by striking at all aspects of the problem can privacy be adequately protected." *Id.*

In particular, the use and disclosure provisions of the wiretap laws are essential parts of Congress' comprehensive scheme to protect the privacy of communications. It is important to keep in mind that the focus of the wiretap laws is on the privacy of the communication itself. 1968 U.S.C.C.A.N. at 2178. Prohibiting use and disclosure of illegally intercepted communications obviously helps preserve the privacy of the communication. As the Fifth Circuit recognized below, "the invasion of privacy that occurs with interception does not then end, but continues anew and spreads with each disclosure or other use of the interception." Pet. App. 57a. Although privacy interests are damaged when a private communication is intercepted, the damage is far greater when that communication is used and disclosed. *Id.* This case aptly demonstrates the need for prohibiting use and disclosure of illegally intercepted calls. The interception and recording destroyed the Peavys' privacy; the uses and disclosures destroyed their lives.

The D.C. Circuit succinctly explained the need to prohibit disclosure (and by implication, use) of illegally intercepted communications:

> Unless disclosure is prohibited, there will be an incentive for illegal interceptions; and unless disclosure is prohibited, the damage caused by an illegal interception will be compounded. It is not enough to prohibit disclosure only by those who conduct the unlawful eavesdropping. One would not expect them to reveal publicly the contents of the

> communication; if they did so they would risk incriminating themselves. It was therefore "essential" for Congress to impose upon third parties, that is, upon those not responsible for the interception, a duty of nondisclosure.

Boehner, 191 F.3d at 470. Without the use and disclosure prohibitions, criminals who illegally intercept calls could "launder intercepted information," and there would be almost no force to deter exposure of any intercepted secret. *Id.* The use and disclosure prohibitions effectively "dry up the market" for illegally intercepted communications, thereby removing a strong incentive for the interceptions. *Id.*

Some have argued that the government's interest in protecting the privacy of communications could be accomplished without the use and disclosure prohibitions, by instead focusing more on apprehending and punishing the interceptor. That argument fails for several reasons. First, the clandestine nature of interception will often make it impossible to find the interceptor. *See, e.g., Bartnicki*, 200 F.3d at 113, 115, 129 (tape left anonymously in mail box; identity of interceptor not known). Second, the government may choose, for whatever reason, not to prosecute the interceptor. In the case at bar, the Harmans were never prosecuted for the interceptions that WFAA and Riggs used and disclosed.[10] Third, the interceptor might not have sufficient assets available to satisfy a civil damage judgment in favor of the victim. Finally, and most importantly, wrongdoers (like WFAA and Riggs) would

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10. Charles Harman was prosecuted for a single interception he committed long after WFAA and Riggs had their 18 tapes. Pet. App. 6a. He pleaded guilty and was punished with a $5,000 fine. *Id.*

be able to shield themselves from liability simply by finding someone else (like the Harmans) to do their "dirty business."[11]

Any incidental restriction on First Amendment freedoms is no greater than is essential to further the governmental interest in protecting the privacy of communications. To satisfy this element of the intermediate scrutiny test, a statute need not be the least speech-restrictive means of advancing the government's interest. *Turner*, 512 U.S. at 662. All that is necessary is that the statute must promote a substantial government interest that would be achieved less effectively absent the regulation. *Id.* The statute will pass constitutional muster as long as it does not burden substantially more speech than is necessary to further the government's legitimate interests. *Id.*

Although the wiretap laws have some incidental effect on speech, as set forth above, they greatly promote the First Amendment right *not* to speak publicly and the Fourth Amendment right of conversational privacy. In the same way, for example, the copyright laws promote rather than offend constitutional values, even though they undeniably restrict some expression. *Harper & Row, Pub., Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985).

The use and disclosure provisions of the wiretap laws do not burden any more speech than is necessary to further the government's legitimate interests. By their terms, the wiretap laws are limited to intentional (*i.e.*, not accidental) use or disclosure by one who "know[s] or ha[s] reason to know that the information was obtained through the interception of a . . . communication in violation of this subsection." 18 U.S.C.

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11. *Gelbard v. United States*, 408 U.S. 41, 63 (1972) (Douglas, J., concurring) (referring to illegally intercepting telephone calls as "dirty business").

§ 2511(1)(c)(d). The Texas wiretap statute contains similar language. Tex. Civ. Prac. & Rem. Code § 123.002.

These provisions avoid any possibility of burdening more speech than necessary to protect the privacy of communications. The use and disclosure prohibitions do not apply to accidental uses or disclosures, and they do not apply unless the person knows or has reason to know how the information was obtained. Furthermore, the exact same information can be used and disclosed freely, as long as it did not come from an illegal interception. In the case at bar, the involvement of WFAA and Riggs in the interceptions absolutely negates any possibility that the wiretap laws, as applied in this case, will chill protected speech or lead to self-censorship. The only speech that is burdened by the wiretap laws as applied in this case is that which is essential to protect the privacy of telephone conversations.[12]

We are not faced here with a reporter who merely received a tip from a source, not knowing how the source got the information.[13] The wiretap laws do not impose or imply any

12. The question of whether the information is a matter of "public significance" is irrelevant to the constitutional analysis. First, the press would not use or disclose information that was not publicly significant in some respect. Second, creating an exception for information of public significance would discriminate on the basis of content, which could raise serious constitutional problems under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. *Hill*, 120 S. Ct. at 2492-93. Third, such an exception would ignore the plain language of the statute and create a judicial exception not contemplated by the legislature. Finally, such an exception would conflict with the suppression rule of 18 U.S.C. § 2515, which prohibits the contents of the illegally intercepted information from being admitted in any judicial proceeding.

13. Nor are we faced here with a person who overheard evidence of imminent violence and disclosed the information in (Cont'd)

duty on the media to determine how their sources got their information. But they do subject the media to liability in situations where (like here) a reporter knows for certain the information was obtained by intercepting private telephone calls and where he participated in and encouraged the interceptions.

4. The Petitioners Violated S. Ct. Rule 29.4(c).

The Petitioners squarely challenge the constitutionality of the use and disclosure provisions of the Texas wiretap statute. Pet. i; Pet. App. 112a. Neither the State of Texas nor any agency, officer, or employee thereof is a party to this case. Pet. ii. Those two facts trigger the notice and certification requirements of S. Ct. Rule 29.4(c). However, the Petitioners failed to comply with any of the provisions of that rule. The Peavys respectfully submit that the Court should deny the Petition with respect to the Texas wiretap act, because the Petitioners failed to notify the Texas Attorney General that a Texas statute is being challenged on constitutional grounds.

B. The Fifth Circuit Correctly Held That Ignorance or Mistake of Law is Not a Defense to Liability Under 18 U.S.C. § 2511(1)(c) and (d). No Review by this Court is Warranted.

It is axiomatic in American jurisprudence that ignorance of the law is no excuse and that all citizens are presumed to know the law. *E.g.*, *Barlow v. United States*, 32 U.S. (7 Pet.) 404, 411 (1833). The Petitioners, however, contend that the Fifth

(Cont'd)
an effort to prevent bodily harm. *Cf. Bartnicki*, 200 F.3d at 113 (local union president talked about blowing off the front porches of persons opposing pay raise). Although some narrow exception for necessity might allow a disclosure to law enforcement officials to prevent imminent violence, there is no possible exception that would allow the media to use and disclose the information for a news report several months after the interception.

Circuit erred in holding that ignorance of the law or mistake of law is not a defense to liability under the federal wiretap act. They contend that they lacked the requisite state of mind to violate the statute because they allegedly relied on the advice of law enforcement officials and their attorney to the effect that their conduct was legal. In support of their argument they grossly misstate the facts and reference inopposite case law.

1. Citizens Cannot Rely on Government Agents' Interpretations of the Law.

WFAA and Riggs contend *they* were advised by law enforcement officials that their conduct was legal. No such thing occurred. In fact, the only law enforcement officials *they* consulted told them it was *illegal*. Pet. App. 5a. Instead, it was Harman who told Riggs that he (Harman) had been told it was legal. Pet. App. 3a. WFAA and Riggs relied blindly on Harman. In actuality, however, Harman had never been told anything of the sort.[14]

In any event, it is irrelevant whether Harman had or had not been told by law enforcement officials that it was legal to intercept the Peavys' calls. *Reynolds v. Spears*, 93 F.3d 428, 436 (8th Cir. 1996) (reliance on law enforcement officer's erroneous advice did not absolve defendant of liability); *Penny v. Giuffridia*, 897 F.2d 1543, 1547 (10th Cir. 1990) (citizens are expected to know the law and may not rely on government agents' incorrect interpretations of the law).

The Model Penal Code, which the Petitioners cite as authoritative, confirms that citizens are *not* entitled to rely on law enforcement officials and government agents to interpret

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14. Pet. App. 2a-3a; *Goodspeed*, 39 F. Supp. 2d at 793-94 ("Harman was never told that his actions were legal.")

the law. As discussed in *Kratz v. Kratz*, 477 F. Supp. 463, 480 (E.D. Penn. 1979), the Model Penal Code states that in order for a *criminal* defendant to claim reasonable reliance on an *official* but erroneous statement of law, the *official* statement of the law must be contained in (1) a statute; (2) a judicial decision; (3) an administrative order; or (4) an *official* interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense. This is not a criminal case, and neither the alleged statements (which never occurred) nor the persons who allegedly made them (who never did) satisfy the standard proposed by the Petitioners.

The Petitioners try to sidestep this clear legal principle by posing a hypothetical about getting written advice from Attorney General Reno about the legality of their conduct. Pet. 18. But nothing like that ever happened in this case. Neither the Petitioners nor the Harmans ever requested or received any advice from Attorney General Reno or anyone in her office. No law enforcement officials or government agents ever told the Harmans their actions were legal. The only advice the Petitioners got from law enforcement officials or government agents was that their activities were *illegal*. Thus, the Petitioners' hypothetical is inapposite to the case at bar.

2. Erroneous Legal Advice is Not a Defense to Liability.

The Petitioners did, however, consult their attorney and initially he was wrong. For that they have a remedy. His erroneous advice, however, does not exculpate them from liability under the federal wiretap act. *Thompson v. Dulaney*, 838 F. Supp. 1535, 1542 (D. Utah 1993), *aff'd*, 970 F.2d 44 (10th Cir. 1992); *Kratz*, 477 F. Supp. at 466. Petitioners argue

that "there is every reason to think that [they] would have acted differently had they received accurate legal advice." Pet. 18. Such a statement is false. Their lawyer corrected himself a short time later and told the Petitioners their conduct was illegal. Undeterred, they nevertheless forged ahead taking comfort in what they considered to be their trump card — the First Amendment. They had a chance to act differently and they did not. They sought not to comply with the law but rather to find a way around it. Petitioners argue they acted responsibly once they heard their conduct was illegal. They did not. Acting responsibly would have required that they cease the investigation completely and move on to another story. With presumed *and* actual knowledge of the law, they chose to continue forward.

The Fifth Circuit, in rejecting the Petitioners' mistake of law defense, aligned itself with every other court that has considered the issue in the context of the federal wiretap laws. The Petitioners cannot cite a single case to the contrary because there are none. To the extent the Petitioners argue that there should be such a defense, that is a matter properly left to the legislature. The courts are justifiably reluctant to create exceptions where none exist, choosing instead to leave those matters properly to the legislature. *E.g.*, *Heggy v. Heggy*, 944 F.2d 1537, 1541-42 (10th Cir. 1991), *cert. denied*, 503 U.S. 951 (1992).

3. The Fifth Circuit Correctly Interpreted the Intent Requirement of the Federal Wiretap Act.

The element of intent under the federal wiretap act[15] means only that the act was done purposefully, rather than accidentally. *E.g.*, *United States v. Townsend*, 987 F. 2d 927, 930 (2d Cir.

15. The Petitioners have not challenged the Fifth Circuit's ruling with respect to the Texas wiretap act.

1993); *Forsyth v. Barr*, 19 F.3d 1527, 1534 (5th Cir.), *cert. denied*, 513 U.S. 871 (1994). The focus of the "intentional" element is on the volitional nature of the act and not on the knowledge of the act's illegality. *E.g.*, *Thompson*, 838 F. Supp. at 1542. The Petitioners do not say their uses and disclosures were accidental.

The language of the statute does not support the Petitioners' mistake of law defense:

> Except as otherwise specifically provided in this chapter any person who . . . intentionally discloses [or uses] . . . the contents of any wire, oral, or electronic communication, knowing or having reason to know the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection. . . .

18 U.S.C. § 2511(1)(c, d). The words "wire, oral, or electronic communication in violation of this subsection" simply describe the kind of information that a person is prohibited from using or disclosing, *e.g.*, information from a telephone conversation intercepted without consent of at least one party to the call or a court order authorizing the interception. The federal wiretap act contains a lengthy description of interceptions that are prohibited, as well as a number of specific exceptions to those prohibitions. The use and disclosure provisions would be unintelligible if they had to repeat all of the terms defining the parameters of which interceptions are prohibited.

The words "knowing or having reason to know" do not imply any requirement that the offender subjectively know the terms of the federal wiretap laws. All they require is that the offender know the *underlying facts and circumstances* of the

interception that would bring the interception within the scope of interceptions prohibited by other parts of the statute. *Forsyth*, 19 F.3d at 1534. As with other laws, everyone is presumed to know the federal wiretap laws. *Id.*

This is not a criminal case, and the standards used in assessing criminal intent do not apply. As noted by the District Court, the federal wiretap act is a general intent statute even in the criminal context. Pet. App. 80a-81a. All of the cases cited by the Petitioners (other than *Kratz* and *Davis*) are criminal cases and involve specific intent crimes. They have no application to this case. *Kratz* involved a lawyer's reliance on a published judicial opinion. 477 F. Supp. at 483. *Davis v. Zirkelbach*, 149 F.3d 614 (5th Cir. 1998), did not involve any issue of intent, but rather involved a defense of official immunity and whether the law at issue was "clearly established" at the time of the official's conduct. *Id.* at 620. Neither *Kratz* nor *Davis* supports the Petitioners' mistake of law defense. *Kratz* expressly rejected that defense. 477 F. Supp. at 480.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MICHAEL J. QUILLING
Counsel of Record
KENNETH A. HILL
QUILLING, SELANDER, CUMMISKEY
& LOWNDS, P.C.
Attorneys for Respondents
2001 Bryan Street, Suite 1800
Dallas, Texas 75201
(214) 871-2100